DEC 23 1942
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 544.

BORO HALL CORP.,
Plaintiff-Petitioner,

—against—

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN and JOHN THOMAS SMITH,
Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ALBERT M. LEVERT,
Counsel for Respondent John Thomas Smith;

JOHN THOMAS SMITH,
Counsel for Respondents General Motors Corporation, et al.

ALBERT M. LEVERT,
GORDON H. BROWN,
Of Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Statement.

The petition egregiously seeks support in a couple of improvisations.

First, the decision of the Second Circuit Court of Appeals herein is not in conflict with any reported decision of any other Circuit Court of Appeals on the same matter, namely, the dismissal of a complaint upon a motion accompanied by affidavits, either under Rules 12 (b) (6), or 56, of the Rules of Civil Procedure. (The petition erroneously states that this question is presented only under Rule 12 (b) (6)—petition, pp. 1, 2, 8). There

is, indeed, as we shall show, in respect of both rules harmony and uniformity of decisions on this matter in all Courts of Appeals where the question arose for decision.

Secondly, the petition presents only a pseudo background of the case. This is achieved by a piece-meal lifting of some elements of the case out of their framework, accompanied by silence as to the whole context. A true picture of the case first requires a rectified statement of the critical facts which underlie the dismissal of the complaint, without leave to amend, by the District Court, the subsequent affirmance in the Court of Appeals, and the later denial of a petition for rehearing (upon affidavits which constitute substantially the entire Volume II of the transcript of record), by a unanimous court.[1] This petition for rehearing by the plaintiff brought about a unanimous decision in which Judge Frank reversed his position and joined with the majority in holding that the original decision had been correct (R. p. 301). The case now before this court, therefore, is an affirmance by the whole Court below—and not by a divided Court as the petition and brief, pp. 4, 18-19, would imply. This result was reached by the following procedural steps:

On behalf of the defendants a motion was made "for an order dismissing the action herein". As it is recited in the order itself, the motion concluded (R. p. 130): "and asking for such other and further relief as to this Court might seem just and proper". It was stated that such motion was made "upon the complaint" and "upon the affidavit and exhibits thereto", which was identified in the notice of motion (R. p. 16). This is in accord with Rule 7 (b) which defines a motion as "an application

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[1] The District Court's opinion (Southern District of New York), R. pp. 124-129, is reported 37 Fed. Supp. 999. The opinions of the Circuit Court of Appeals, 2d Circuit: (a) upon affirmance, R. pp. 142-6, is reported 124 Fed. 2d 822; (b) upon denial of the petition for rehearing, R. pp. 301-303, is reported 130 Fed. 2d 196.

to the court for an order". The Court will also notice that no mention is made in the notice of motion either of Rule 12 (b) (6) or of Rule 56, but the grounds were stated to be that, viz., "the complaint fails to state a claim, in law or fact, upon which relief can be granted". The identified affidavit stated among other things that it (R. p. 23):

> "* * * set forth the entire relations of the defendants herein with the Boro Hall Chevrolet, Inc., in respect of the matters referred to in the complaint in this action * * *".

(The material parts of the affidavit and correspondence are at R. pp. 17-119).

The plaintiff filed an affidavit in opposition (pp. 120-122), (about which the petition is also silent). Moreover, as the Court of Appeals points out (R. p. 143):

> "In the papers submitted for the plaintiff it is said that its president Giordano did not deny or contradict the statements contained in the affidavit submitted on behalf of the defendants, nor impugn the authenticity or contents of any of the letters and documents annexed thereto, except as set forth in his affidavit, which, however, contained no denial of any material matter". (See also R. p. 123).

The facts before the Court were, therefore, undisputed and uncontradicted. And the decisions below were based on the complaint and the conceded facts. The function and relation of the factual elements to each other are stated with fullness in the opinions of the District Court Judge and the Court of Appeals (R. pp. 124-129, 142-6); we adopt the recitations of the facts as our rectified statement of facts and, in the interest of brevity, respectfully invite this Court's attention thereto.

Since the petition carries the implication at pp. 5-6 that sales of new or used cars by the plaintiff were limited to its assigned Zone of Influence, and that the plaintiff was prohibited from opening used car outlets outside the said Zone of Influence, we may point out that this is not correct. As the opinion points out (R. p. 143):

> "* * * the uncontradicted affidavit filed on behalf of the defendants negatives the claim that used cars could only be sold by the plaintiff within the 'Zone of Influence' ",

and again that

> "* * * the effect of the proof is that General Motors Sales Corporation required no more than that the location of a used car depot should be fixed by agreement at such a place as would not unduly prejudice other dealers who did business with the seller."

This both Courts found reasonable. Indeed, the plaintiff himself strenuously objected that any other Chevrolet dealer should have any authorized places of business, with the Chevrolet name, within his assigned Zone of Influence. Plaintiff had even complained of dealers who had places of business "a block or so from the edge of my territory", and that this would "crowd" its territory; plaintiff further wanted that "all dealerships" should be located "near the center of their own zones of influence", and that no "branch office" should be permitted in a dealer's own territory (R. pp. 91-94; cf. R. pp. 167A, B). On this point the District Court found (R. p. 128):

> "* * * I can find nothing unreasonable in the effort of the defendants to prevent the plaintiff from trading upon defendants' name in areas in which the name had been delegated to others". (See also R. p. 144).

Judge Frank in his original dissenting opinion in respect of this conclusion had said (R. p. 145):

> "On the other hand, a restriction of the place of sale of unused cars so as not to unduly prejudice other dealers might be reasonable",

but thought that "the record facts are not sufficient to show that such is the case here". To which he added that the defendants

> "* * * at a trial, or by a motion accompanied by affidavits setting forth the facts more in detail can raise the issue as to the reasonableness of their proposed restriction on the place of sale of used cars".

The plaintiff took his cue from this statement and made an anomalous petition for a rehearing. The defendants were ordered to reply thereto. In reply, the facts which Judge Frank thought ought to be shown were produced from the plaintiff's own record of sales. These statistical facts appear at Record, pp. 154-7, and 157 A, B, C, D. The reasonableness of the restriction was completely demonstrated. It showed not only that the plaintiff was not restricted in sales of new or used cars to his Zone of Influence, but also that other Chevrolet dealers sold more new and used cars in plaintiff's Zone of Influence where they had no outlets. It further proved that the plaintiff sold more new and used cars outside of its Zone of Influence, where it had no establishment, than within it where it had three establishments. This belied the argumentative claim which had been made below, and repeated in the petition for rehearing, that (R. p. 151):

> "The location of our new car salesroom in our zone of influence did not affect our new car sales but that the confining of used car outlets therein had such harmful effects on our business."

The figures from plaintiff's own books showed (R. p. 157 A, B, C, D):

	Sales by Plaintiff Boro Hall Chevrolet, Inc. in Its Own Zone of Influence (3 Outlets)		Sales by About 23 Other Chevrolet Dealers Into Plaintiff's Zone of Influence (No Outlets)		Sales by Plaintiff Boro Hall Chevrolet, Inc. Outside Its Own Zone of Influence Into Other Chevrolet Dealers' Zones (No Outlets)	
Year	New Cars	Used Cars	New Cars	Used Cars	New Cars	Used Cars
1938	70	114	176	205	168	174
1939	46	108	100	151	173	189
Total	116	222	276	356	341	363

For these two years plaintiff sold outside its zone of influence to residents outside its own zone (where it had no establishments) 160 more new Chevrolet cars than it sold in its own territory (where it had three establishments), and 134 more used cars than it sold in its own territory. On the other hand, other authorized Chevrolet dealers in Kings and Queens Counties, without any new or used car outlets therein, sold to residents within plaintiff's territory from their establishments in outlying districts 341 new Chevrolet cars, or 235 more than plaintiff itself sold; and, 363 used cars, or 141 more than plaintiff itself sold there with its three establishments. These figures established the correctness of the conclusion of the majority of the judges of the second circuit, with an approximation to mathematical certainty, that (R. p. 144):

> "There was no proof that the General Motors Sales Corporation required a location for the sale of used cars that was unfair to the plaintiff • • •.
>
> • • • • • • • •
>
> "We regard the record as showing no such burden and hold that leave to amend was properly denied."

And further that:

> "The record establishes that the plaintiff was not restricted to sales within its 'Zone of Influence', that it had only a non-exclusive sales contract * * *".

On this basis, upon rehearing, Judge Frank concurred in the opinion which denied the petition; and, in effect, he revoked his previous dissent: he agreed that the original decision had been correct. Said the now unanimous Court (R. p. 301):

> "Taking the plaintiff's affidavits on its motion at their face value, there can be no doubt that there was ample competition in the low-price car field in Brooklyn. * * * The proof shows that if plaintiff could have selected a site for a used car outlet where any gain on its part would not have represented another dealer's loss the selection would have been acquiesced in".

Argument.

(i) The decision of the C. C. A. 2d that it was proper to consider affidavits in connection with the motion to dismiss the action is not in conflict with the decision of any other Circuit Court of Appeals.

(ii) The questions presented were questions of fact peculiar to the case, are not of general importance and are not worthy of review by this Court.

We shall pass immediately to (i) of the above argument because, in our submission, the correctness of (ii) was demonstrated in the course of our statement.

Indeed, the authorities go far beyond the requirements of the present case. In the instant case not only does the complaint fail to state a cause of action (R. pp. 126; 129); the undisputed relevant affidavit facts also show

that the facts arising out of the relation of the plaintiff and defendants to each other in respect of the claim made in the complaint could not, in any event and in any view, give rise to any cause of action under the anti-trust laws.

With unanimity, Circuit Courts of Appeals have held that it was proper to consider affidavits in connection with a motion to dismiss, either under Rule 12 (b) 6 in connection with Rule 43 (e),[2] or under the Summary Judgment Rule 56,[2]—whenever and wherever the question was presented. There are no decisions to the contrary. In addition to the two decisions in the instant case, there are three other cases to the same effect in the 2d Circuit; two cases in the 3rd Circuit; two cases in the 5th Circuit; and one case each in the 6th and 7th Circuits, as follows:

Second Circuit.

(Dec. 6, 1940—*Central Mexico Light & Power Co.* v. *Munch*, 2 Cir., 116 Fed. 2d 85, 87.

The Court said, p. 87:

> "It is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion".

(Feb. 26, 1942)—*Cohen, et al.* v. *American Window Glass Co.*, 2d Cir., 126 Fed. 2d 111, 114 (to the same effect on all points as the first cited case).

(July 6, 1942—*Samara* v. *United States*, 2d Cir., 129 Fed. 2d, 594, 597 (to the same effect as the two first cited cases).

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[2] Printed in Appendix.

Third Circuit.

(May 21, 1941)—*Gallup* v. *Caldwell*, 3d Cir., 120 Fed. 2d 90, 92-93.

(April 9, 1942)—*Victory* v. *Manning*, 3d Cir., 128 Fed. 2d 415, 416.

Fifth Circuit.

(May 15, 1941)—*Board of Public Instruction for County of Hernando, State of Florida* v. *Meredith et al.*, 5th Cir., 119 Fed. 2d 712, 713; certiorari denied October 13, 1942, U. S. Sup. Ct. 86 L. ed. 82.

This was a motion for summary judgment on the pleadings, the request for admission and supporting affidavits under Rule 56. The Court said at p. 713;

> "It was entirely in keeping with the letter and spirit of Rule 56 that this could be done by ex parte affidavits which were not offset by opposing affidavits."

The court cited a previous case in the same circuit to the same effect, to wit:

(June 23, 1939)—*Port of Palm Beach Dist.* v. *Goethals*, 5th Cir., 104 Fed. 2d 706, 708.

Sixth Circuit.

(June 6, 1942)—*Lucking et al.* v. *Delano, etc.*, 6th Cir., 129 Fed. 2d 283, 285.

Seventh Circuit.

(Dec. 22, 1941)—*Weeks, et al.* v. *Barcco Oil Co., et al.*, 125 Fed. 2d 84, 93.

It is a little startling to find that the petition omits to mention these cases from other Courts of Appeals in

its assertion of a conflict of decisions. Again, we are obliged, not without wonder, to point out that in the petition at pp. 9 and 16 the case of *Continental Collieries* v. *Shober*, 3d Cir., 130 Fed. 2nd 631, is cited not only in support of this claim but even as being in opposition to the case of *Gallup* v. *Caldwell*, a case in the same circuit. In the case of *Continental Collieries* v. *Shober* the motion was to dismiss the complaint for insufficiency on its face, and without more. No affidavit in support of the motion was involved. In *Victory* v. *Manning*, above cited, and not referred to in the petition—the only case besides *Gallup* v. *Caldwell*—where the point was directly in issue in the 3rd Circuit, that Court said at 128 Fed. 2d p. 416:

> "This Court recently had occasion to examine the problem of whether speaking motions are permitted under the new Rules and concluded that they are. *Gallup* v. *Caldwell*, 3 Cir., 1941, 120 F. 2d 90".

The case of *Cohen* v. *United States*, 8th Cir., 129 F. 2d 733, another Circuit Court of Appeals case through which the petition (pp. 8, 15) seeks support was again a mere motion to dismiss the complaint, upon its face, and without more. No affidavit was involved. (See 129 Fed. 2d at p. 736).

In the impermeable forest zone of undigested District Court cases in the petition, at p. 18, there is a reference to a 7th Circuit case, namely, *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.*, 108 Fed. 2d 433 (1939). This case not only does not involve the point but, in so far as its dicta went, it is wholly in accord with the authorities given by us. The question was: should the Court take judicial notice "of the contents of a file wrapper", on a motion to dismiss a patent suit. The Court went on to say that a motion for judgment under Rule 56 would lie (108 Fed. 2d at p. 436):

> "Such motions for judgment may be heard on affidavits. Such a practice lessens the need of motions

to dismiss although it probably does not eliminate the practice."

Nearly two years later, the same Circuit Court of Appeals decided the case of *Weeks et al.* v. *Barco Oil Co., et al.*, 125 Fed. 2d 84 (1941), which we mention above. The point was directly involved on a motion to dismiss the action, upon affidavits. That Court said (at p. 93):

> "We think this form of proof was proper on this motion to dismiss, Rule 43 (e); *Central Mexico Light Co.* v. *Munch*, 2 Cir., 116 F. 2d 85; *Railway Express Agency, Inc.* v. *Jones*, 7 Cir., 106 F. 2d 341; *Pelelas* v. *Caterpillar Tractor Co.*, 7 Cir., 113 F. 2d 629; *Gallup* v. *Caldwell*, 3 Cir., 120 F. 2d 90, decided May 21, 1941. These affidavits were before the court and were properly considered. Their contents were not challenged by counter affidavits or other proof".

Although the District Court cases at petition p. 16 are immaterial, indeed wholly tangential to the issue here and now, we may point out that of a total of 19 unanalyzed cases, 8 are from New York and, (even assuming the point was involved and that the situations therein were not easily distinguishable), are overruled by the C. C. A. 2d decisions; one case each from Pennsylvania and New Jersey are overruled by the C. C. A. 3d decisions; two cases from Georgia, overruled by the C. C. A. 5th decisions; one case each from Kentucky and Ohio, overruled by the C. C. A. 6th decision; one Illinois case, overruled by the C. C. A. 7th decision—a total of 15 of the 19 cases overruled. In the Oklahoma D. C. case of *Baker* v. *Sisk*, 1 F. R. D. 232: a summary judgment upon affidavits was granted, and a motion voluntarily to dismiss by the plaintiff denied; in the other Oklahoma case, *Eberle* v. *Sinclair Prairie Oil Co.*, 35 Fed. Supp. 296, 298: a motion for summary judgment was granted upon affidavits, affirmed at 120 Fed. 2d 746 (10th Cir.), where the

question did not even arise; in the California D. C. case of *Dirk Ter Haar* v. *Seaboard Oil Co. of Delaware, et al.*, 1 F. R. D. 598; it does not appear that any affidavit facts were involved. The same Judge who decided the *McConville* v. *District of Columbia* (D. C. Dist. Col.) 26 Fed. Supp. 295, later in the case of *American-Mexican Claims Bureau Inc.* v. *Morgenthau*, 26 Fed. Supp. 904, 905, granted a motion to dismiss an action, upon affidavits. Against this there are so many District Court cases wholly in accord with the present decisions that it would be boresome to list them. On this showing, a conflict even of District Courts can not now be plausibly asserted.

Equity Rule 29 is not of the slightest relevancy on the question of the meaning of Rule 12 (b) (6) for the text of the latter is altogether different. Judge Clark, now of the C. C. A. 2d, and one of the draftsmen of the rule, has repeatedly pointed this out. ("Proceedings", Session of Washington, D. C. Institute on Federal Rules, pp. 74-5). These differences are clearly stated in the case of *Alabama Independent Service Station Ass'n., Inc.* v. *Shell Petroleum Corp.*, (D. C., N. D. Alabama), 28 Fed. Supp. 386, 388-9, in which the Court said:

> "This rule (speaking of Rule 12 (b) (6)) differs significantly from the former Equity Rule 29, 28 U. S. C. A. following Section 723, in that the latter provided only for 'every defense in point of law arising upon the face of the bill' by motion. We are of the opinion that the affidavits, depositions and answers to interrogatories may be considered here on all of the motions, the latter being within the terms of Rule 12 (b) defenses in law and fact."

CONCLUSION.

In view of the foregoing deliberations, the decisions of the C. C. A. 2d and of the District Court are correct, and the petition should be denied.

Respectfully submitted,

ALBERT M. LEVERT,
Counsel for Respondent John Thomas Smith;

JOHN THOMAS SMITH,
Counsel for Respondents General Motors Corporation, et al.

ALBERT M. LEVERT,
GORDON H. BROWN,
Of Counsel for Respondents.

Dated, New York, N. Y., Dec. 23, 1942.